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NOTES.

BANKRUPTCY—CONFLICT OF JURISDICTIONS—What are the rights of a receiver in bankruptcy with respect to land concerning which a controversy is then pending in the State court between the bankrupt and another? This question was presented for decision in a recent case before the Georgia Supreme Court under a peculiar state of facts.[1]

Several creditors of an insolvent corporation instituted a proceeding in the State court for the appointment of a receiver to administer the assets for the benefit of its creditors. In answer thereto, the corporation filed a cross petition, alleging that one of the petitioning creditors, in conjunction with others, had fraudulently obtained a deed of conveyance of certain land from it and praying that the deed be cancelled and the land in controversy placed in the hands of a receiver. After an *ex parte* order to that effect was made and while these proceedings were still pending,

[1] Harris v. Luxury Fruit Co., 82 S. E. Rep. 447 (Ga. 1914).

the corporation was adjudicated an involuntary bankrupt. The court of bankruptcy appointed a receiver who applied to the State court to have all the corporate assets delivered to him; and, in accordance therewith, the judge of the State court directed the receiver appointed by him to deliver all assets in his hands, including the disputed land.

On appeal to the Supreme Court, this order was reversed and the lower court was ordered to retain its jurisdiction over the land in controversy. Mr. Justice Atkinson, in delivering the opinion of the court, said, *inter alia*,[2] "Section 70 of the Bankruptcy Act, by operation of law vests title of the bankrupt in the trustee in bankruptcy, but does not purport to divest the title or right of possession of third persons holding adversely to the bankrupt. In other words, adjudication in bankruptcy will not operate automatically as a judgment in ejectment, ousting adverse claimants from the possession of land. The federal bankruptcy law supersedes the state insolvency law in regard to the administration of insolvent estates. See 1 Remington on Bankruptcy, §1602. But this refers particularly to the estate of the insolvent and has no application to rights of others holding adversely to the insolvent. . . . The remedy of the trustee in bankruptcy was, under section 11 of the bankruptcy act, to apply to the State court to be made a party in lieu of the Luxury Fruit Company, to prosecute the rights asserted in the cross-bill."

The question presented and discussed in this case recalls the doubt which existed at the time when the Bankruptcy Act of 1867 was in force. It was, at that time, the prevailing opinion that the moment a man was declared bankrupt, not only was all control of his assets drawn to the court of bankruptcy by its act of adjudicating him a bankrupt, but all contested rights could be litigated with the trustee in no other court and all proceedings then pending in other courts could not be continued unless transferred to the court of bankruptcy. Accordingly, it became the prevailing practice to bring all adverse claimants into the bankruptcy court by a rule to show cause. Against this practice, the Supreme Court of United States steadily set its face.[3]

When the Bankruptcy Act of 1898 went into effect, some referees in bankruptcy and judges, disregarding the experience under the previous Act, began to follow the practice which had prevailed until *Eyster* v. *Gaff*[4] had stated the contrary. When the question arose as to whether, under the present Act, a court of bankruptcy in which proceedings in bankruptcy were pending has

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[2] At page 449.

[3] See discussion of this question in Linstroth Wagon Co. v. Ballew, 149 Fed. Rep. 960 (1907); also see Eyster v. Goff, 91 U. S. 525 (1875).

[4] 91 U. S. 525 (1875).

jurisdiction to entertain a suit by a trustee in bankruptcy against a person holding and claiming, as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors, it was held [5] that, by the provision of Section Twenty-Three b of the Act, no jurisdiction, except by consent, existed in the bankruptcy court over adverse claimants and that such suits could only be maintained in the State courts, or, in case of diversity of citizenship, *etc.*, in the federal courts. As a result of this decision, the amendatory Act of 1903 conferred concurrent jurisdiction of suits by trustees for such recoveries on the bankruptcy court and State court which would have had jurisdiction if bankruptcy had not intervened.

In general, it may be said that the courts deal very cautiously with questions of conflict of jurisdiction between the bankruptcy and State courts.[6] They, however, have certain well defined rules which are usually followed. In accordance with the well settled principle of law that the court which first obtains jurisdiction over the *res* retains it to the end, it is generally held that if a State court obtains possession of property, later claimed by the trustee in bankruptcy, before the petition is filed, it continues to retain jurisdiction over the entire matter, except in three particular instances.[7]

The first exception to this principle is, that where a lien has been created in the State court by legal proceedings within four months of the bankruptcy and while the debtor is insolvent, the State court does not retain its jurisdiction over the property in its possession.[8] The basis of this exception is usually stated to be that "the lien thus created is itself null and void, and being created by the legal proceedings the legal proceedings themselves are null and void and fall to the ground." [9] Another exception, where the State court loses its jurisdiction, occurs when a receiver, assignee for the benefit of creditors or trustee appointed by the State court within four months before filing the bankruptcy petition is in possession.[10] In such case also, the custody of the particular official is superseded by bankruptcy proceedings. The reason for this exception seems to be in doubt. The courts usually place it on the ground that, as the making of an assignment, *etc.*, is declared to be an act

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[5] Bardes v. First Nat. Bank, 178 U. S. 524 (1900).

[6] 1 Remington on Bankruptcy, §1581.

[7] Pickens v. Dent, 187 U. S. 177 (1902); Marble Co. v. Grant, 135 Fed. Rep. 322 (1905); *In re* Shoemaker, 112 Fed. Rep. 648 (1902). The reverse is also true, that where the bankruptcy court has once assumed jurisdiction over the property, it has jurisdiction to determine all rights therein. *In re* Mertens, 131 Fed. Rep. 507 (1904); *In re* Moody, 134 Fed. Rep. 628 (1905).

[8] 1 Remington on Bankruptcy, §1599.

[9] 1 Remington on Bankruptcy, §1599.

[10] *In re* Storck Co., 114 Fed. Rep. 860 (1902); *In re* Knight, 125 Fed. Rep. 35 (1904).

of bankruptcy, it could not have been intended that the very conveyance which warrants putting the grantor into bankruptcy should be valid and have the effect of withdrawing all the grantor's property from distribution in bankruptcy.[11] Finally, where the property at the time of the bankruptcy is in the custody of a State court under State insolvency proceedings, such proceedings are superseded by the federal bankruptcy proceedings.[12] The basis of this supersedence lies in the paramount authority conferred by the Constitution on Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United States." [13]

N. I. S. G.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—ADMISSIBILITY OF EVIDENCE OBTAINED WRONGFULLY—Does that clause of the Bill of Rights which makes inviolate the right of the people to be secure in their persons, papers, and effects, of itself render inadmissible in evidence papers and effects wrongfully obtained from the house of the defendant? This question was answered in the affirmative without dissent by the Supreme Court of the United States, Mr. Justice Day, in *Weeks* v. *United States*.[1]

This is the first case in which the question has arisen within the federal jurisdiction and been determined there with regard to the Fourth Amendment to the United States Constitution. But numerous decisions have been given upon the same clause in State constitutions tending with astounding uniformity toward judicial nullification of that constitutional, and supposedly fundamental, guarantee of personal liberty and protection. The fountain-head of this emasculating doctrine is found in the unwarranted *dictum* of Mr. Justice Wilde in *Commonwealth* v. *Dana*.[2] In that case there was an indictment for operating a lottery, *etc.; a warrant had been issued upon proper information,* and under it the defendant was taken and the lottery tickets and materials seized. The court rules, on page 336: "We are also of opinion that the warrant in this case is in conformity with all the requisitions of the statute and the declaration of rights. The complaint is under oath and alleges a probable cause to authorize the search and seizure. The articles are described, and the place in which they were concealed is designated

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[11] *Obiter,* Randolph v. Scruggs, 190 U. S. 533 (1903).

[12] Corling v. Seyman Co., 113 Fed. Rep. 483 (1902); *In re* Curtis, 91 Fed. Rep. 737 (1899); *In re* Etheridge, 92 Fed. Rep. 329 (1899).

[13] Article I, §8; Constitution of the United States.

[1] 34 Supreme Court Rep. 341 (1914).

[2] 2 Metc. 329 (Mass. 1841).

with sufficient certainty." Then comes the broad *dictum* at page 337, after the express determination that the warrant was entirely legal and unimpeachable—"*Admitting* that the lottery tickets and materials were illegally seized,[3] still there is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence, the court can take no notice of how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question. This point was decided in the cases of *Legatt* v. *Tollervey*[4] and *Jordan* v. *Lewis*,[5] and we are entirely satisfied that the principle upon which these cases were decided is sound, and well established." That such an enunciation upon a fundamental constitutional guarantee is not to be defended is shown by the facts that (1) it is pure *dictum;* (2) the two English cases referred to are based upon an offer in evidence in an action for malicious prosecution of records of court obtained without the necessary sanction of the court whence they came, *i. e.,* an independent source—obviously a fundamentally different question than that of papers, *etc.,* obtained wrongfully from the defendant who is now on trial; and (3) such ruling is subversive of an express constitutional guarantee, the vitalization and enforcement of which is the avowed and peculiar duty of the court—especially in cases so inherently involving questions of personal protection and security, and of public peace and order.

So much for the inception of the doctrine. Its growth and adoption is even more indefensible in view of the usual thoroughness of research and alertness to preserve constitutional guarantees displayed by the highest courts of the States where it has found sanction. But every case appended below [6] has adopted the rule that such guarantee does not cover the acts of individual officers; that the State in neither judicial, legislative, nor executive capacity is

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[3] It may be suggested the surprising and unquestioned acceptance which Wilde's, J., *dictum* in the Dana Case has received, is due to the peculiar language there used—"Admitting that the lottery tickets and materials were illegally seized," as though the court had just determined that they were so seized, whereas they had just determined the warrant under which they were taken to be valid. It was a decidedly misleading way to state a position assumed *arguendo* and *obiter.*

[4] 14 East, 302 (Eng. 1811).

[5] Reported 14 East, 306 n.; decided prior to 1760.

[6] Com. v. Dana, *supra,* n. 2; State v. Flynn, 36 N. H. 64 (1858); Gindrat v. People, 138 Ill. 103 (1891); Shields v. State, 104 Ala. 35 (1893); State v.

chargeable with the suppression of such wrongfully obtained evidence; and that the injured individual must seek his remedy against the officer *for the trespass*—as though there were nothing more than an incidental civil injury involved. There has been an utter failure to observe the distinctions between evidence obtained under search without a warrant,[7] and that under warrant;[8] between express warrant to seize the precise papers now offered,[9] and those taken in excess of, or without warrant;[10] between those taken in connection with the arrest of the person, either with or without warrant,[11] and those taken independently, either with or without warrant.[12] Case upon case, they have builded upon the Dana Case, quoting the *dictum* set out above as the express decision of the court therein rendered, and upon the English cases there cited, each new case being in turn an added "authority" for a case of later date; and even text writers, citing the Dana Case, have glibly stated the rule to be as given there,[13] and have in turn themselves been bases of "authority" for the rule.[14] Some day an observing court will read the Dana Case in its entirety and the house of cards will fall.

The supreme stultification of the exponents of this doctrine emanates from the Supreme Court of Georgia in *Williams* v. *State*:[15]

Atkinson, 40 S. C. 363 (1893); State v. Pomeroy, 130 Mo. 489 (1895); Williams v. State, 100 Ga. 511 (1897); State v. Griswold, 67 Conn. 290 (1896); Adams v. People, 176 N. Y. 351 (1903). These cases are the first in their respective jurisdictions; but in several instances have been followed by later decisions affirming them. But there is also a current of State decisions *contra*, and *accord* with the federal rule, Iowa v. Sheridan, 121 Iowa, 164 (1903); Iowa v. Height, 117 Iowa, 650 (1902); Hoover v. McChesney, 84 Fed. Rep. 472 (1897); and Slamon v. State, 73 Vt. 212 (1901), but see State v. Krinski, 78 Vt. 162 (1905).

[7] Evidence obtained under warrant, Adams v. People, Com. v. Dana, and State v. Flynn, *supra*, note 5.

[8] Without or in violation of warrant, State v. Griswold, Williams v. State, Gindrat v. People, State v. Pomeroy, Shields v. State, and State v. Atkinson, *supra*, note 5.

[9] Adams v. People, State v. Flynn, *supra*, note 5.

[10] Williams v. State, State v. Griswold, *supra*, note 5.

[11] State v. Pomeroy, *supra*, note 5.

[12] State v. Griswold, *supra*, note 5.

[13] See Greenleaf (Crosswell Ed.) §254a, citing Gindrat v. People, and Com. v. Dana; Taylor, Evid. citing the two English cases and Com. v. Dana; see Wigmore, Evid. §2183, for generous citation of these and subsequent cases.

[14] Adams v. People, and Shields v. State; State v. Atkinson, citing in turn Greenl.

[15] 100 Ga. 511 (1897), at page 519.

"We are satisfied that the contention of the accused, that her constitutional rights were infringed by the admission of the evidence complained of, ought not to be sustained [the detective's testimony that without warrant, before the arrest of the accused, he took from her apron pocket a purse in which he found coins previously marked by him and used in the illicit purchase of liquors]. As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures was to place a salutary restriction upon the powers of government. That is to say, we believe that the framers of the Constitution of the United States, and this and other States, merely sought to provide against any attempt by legislation or otherwise, *to authorize, justify, or declare lawful*[16] any unreasonable search or seizure. This wise restriction was intended to operate upon the legislative bodies so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary so as to render it the duty of the courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility, and of their own volition, surely none of these three divisions of the government is responsible. If an official or mere petty agent of the State exceeds or abuses the authority with which he is clothed, he is deemed to be acting, not for the State, but for himself only; and therefore he alone and not the State should be held accountable for his acts."

The short result of this decision is that so long as the legislature refrains from enacting a statute, and, consequently, so long as the executive and the courts have no statute to enforce, there is nothing for the constitutional provision to operate upon. Or again assuming the legislature to have enacted such a statute, and the executive to have attempted to utilize it, the constitutional clause against search and seizure is invoked, the officer justifies under the statute, the result must be that the statute is a nullity, and furnishes no protection to the officer, and he is answerable. But meanwhile what has become of the citizen's right to be secure from unreasonable searches and seizures; and to prevent evidence thus obtained from being used against him? It has disappeared absolutely.

However, a more wholesome view of the operations of this guarantee is entertained by the Supreme Court of the United States in the Weeks Case.[17] The defendant had been taken in custody while away from his home by a police officer without warrant; while

[16] Italics are those of the court.

[17] *Supra*, note 1.

other police officers without warrant searched his room, obtained papers, and later turned them over to the marshal; later the marshal went to his home, obtained admission and stripped his room of all papers and effects available, some private, some tending to establish the fact of lottery operations. Petition was made before trial for a return of these papers; the private papers returned, but the others refused. The petition was renewed at opening of trial; was refused and the papers admitted in evidence over the objection of the defendant that such admission was a violation of the Fourth Amendment. The trial being had in the District Court, the issue thus presented itself squarely for determination as a federal question. While the court is careful to state the question precisely, and observes that it is not a question of objection, raised for the first time at trial, of whether evidence obtained *under lawful warrant* is admissible in evidence (which was the ruling acquiesced in under its ruling in the case of *Adams* v. *New York* [18]), yet the statements made in the decision are so emphatic and go so deeply into the fundamentals of constitutional rights, that the case stands squarely against the evasive distinctions and refinements of the State courts. To quote, "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, . . . and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without a sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In *Adams* v. *New York* this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law,

[18] 192 U. S. 585; 48 L. Ed. 575 (1904), upon writ of error to the Supreme Court of New York to review the decision as reported in Adams v. People, 176 N. Y. 351 (1903).

acting under legislative or judicial sanction. This protection is equally extended to the action of the government and the officers of the law acting under it.[19] To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[20] And in an earlier part of the opinion it was said: "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." [21]

Clearly such an exposition of the meaning of the clause guaranteeing freedom from unreasonable search and seizure explodes the fallacious pronouncements of cases like *Commonwealth* v. *Dana* and *Williams* v. *State*. Nor can the exponents of that doctrine take refuge in the distinction that the Weeks Case turned merely upon the effect of prior petition and refusal to return the papers seized. The decision is too emphatic and deep for that; and the case was one of unlawful seizure. Nor will the decision of the United States Supreme Court in the Adams Case avail; for the decision in the Weeks Case specifically recognizes that they passed on nothing further in the Adams Case than the admissibility in evidence of papers *taken under a warrant* specifically authorizing a search for gambling paraphernalia, and the papers were a part of such. Further, a decision that attempted to restrict the effect of the Weeks decision to mere procedural scope, would in itself admit that a procedural error committed in the early stages of the trial, even though attempted to be corrected before final disposition of the cause, would operate to deprive a man of one of the fundamental constitutional guarantees. Such a view finds no encouragement in the Weeks Case, and is in decided contrast with the zeal displayed by the courts universally in vitalizing and enforcing the other constitutional clause affording protection to the individual, *e. g.*, "self

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[19] Boyd v. U. S., 116 U. S. 616; 29 L. Ed. 746 (1886), affirmed and relied on in Weeks Case. See Wigmore's adverse criticism of the Boyd Case, §2264.

[20] *Ex parte* Jackson, 96 U. S. 727 (1877); Boyd v. U. S., *supra*, note 18; Bram v. U. S., 168 U. S. 532 (1897).

[21] Cases, *supra*, note 19, and the famous English case of Entick v. Carrington, 19 How. St. Tr. 1030 (1765), in which Lord Camden laid down the common law, and prerogative rights in regard to the issuance, execution and protection from search warrants, except they be in conformity to the Bill of Rights. Cooley, Constl. Limitations, 364-373.

incrimination," "twice in jeopardy," "due process," or "trial by jury." It is difficult to see how these are in their nature any *more* fundamentally inherent constitutional guarantees which of themselves enjoin their observance on the courts than is that of unreasonable searches and seizures, which several State courts have relegated to a question of "collateral issue," merely.

J. C. A.

INTERSTATE COMMERCE—CARMARK AMENDMENT—LIABILITY FOR DELAY—A carload of strawberries was delivered by a shipper (the plaintiff and appellee) to a railroad company (defendant and appellant) for transportation from Marion, Md., to New York City over the lines of the defendant and connecting carriers. The declaration alleged that the defendant, or companies operating connecting lines, failed to forward the shipment with reasonable dispatch; that because of this delay the berries did not reach their destination until after the close of the market for which they were intended, and for which they would have arrived in time if due diligence had been observed in their transportation; and that they consequently sustained a loss in value. The evidence showed that the berries were shipped on the afternoon of Thursday, May 26, and, according to the usual operation of trains engaged in this class of service, they should have been delivered in New York City the following night, in advance of the early Saturday morning wholesale market, which opened about 1 o'clock A. M. The shipment reached its destination in good condition, but about six hours later than the customary time of arrival. The wholesale market, for which the berries were shipped, and in which they could have been sold to advantage, was then practically at an end, and the price had fallen two or three cents per quart below that which might have been received if they had been forwarded with the usual dispatch. The berries had to be sold at these lower prices because of the delay in their delivery. The defendant was sued as the initial carrier under the Carmark Amendment to the Interstate Commerce Act[1] and a verdict of two cents per quart was obtained, which was sustained

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[1] Act of Feb. 4, 1887, c. 104, §20, 24 Stat. 386, U. S. Comp. St. 1901, p. 3169, as amended by Act of June 29, 1906, c. 3591, §7, 34 Stat. 593, U. S. Comp. St. Supp. 1911, p. 1307, which provides in part:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder therefor for *any loss, damage, or injury to such property caused by it* or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

on appeal. The court held that the loss of value resulting from the delay in transit was within the purview of the provisions making the initial carrier liable "for any loss, damage, or injury to such property." [2]

So far as has been able to be discovered, this is the first case, either in a State court or in a federal court in which the single question as to whether "delay" is covered by the words "loss, damage, or injury to such property," has been thoroughly considered and decided. In *Gulf, C. & S. F. Ry.* v. *Nelson* [3] the court said *obiter:* "The federal statute, commonly known as the "Carmark Amendment," making the initial carrier liable in interstate shipments, does not, in our opinion, apply where the damage claimed is not in reference to the property itself, which is the subject of the transportation. Here the property was not damaged in any manner. The principles of law which govern this case are those general principles which enter in the common law of carriers." In disposing of that case the Maryland court in the principal case said: "As the property shipped in that case was not affected in its condition or value, it was held that the suit was properly based on the common law right of recovery rather than upon the federal statute. This decision is not at all at variance with our conclusion of the present case." As to whether this is a distinction without a difference, is left to the reader to judge from the facts of the two cases. In the Texas case [4] the consequential damages consisted in additional expense and loss of profits caused by the late arrival of shipments of lumber which delayed the completion of structural work. The lumber, which was the property transported, was used, but because of the delay in its arrival, the machinery and men were compelled to be idle, thus causing additional expense. In the Maryland case [5] the consequential damages consisted in the loss of profits caused by the late arrival of the berries which resulted from the disposal of the berries at a less advantageous price than would have been possible if there had been no delay. The berries, however, had not been affected in their "condition"; they had not deteriorated so far as quality was concerned, but were, on the other hand, sold as good berries, a lower price, however, being received for them because the market was almost over.

In the principal case [6] it was argued on behalf of the defendant that the only cases for which the statute provides are those in which

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[2] N. Y. P. & N. R. Co. v. Peninsula Produce Exchange of Maryland, 89 Atl. Rep. 433 (Md. 1914). We are, however, advised, that this case has been appealed to the Supreme Court of the United States.

[3] 139 S. W. Rep. 81 (Tex. 1911).

[4] *Supra,* note 3.

[5] *Supra,* note 2.

[6] *Supra,* note 2.

the commodities themselves become damaged or depleted in the course of the transportation, and that an impairment of value due to delay in delivery, while it occasions a loss to the owner, does not produce any "loss, damage, or injury to the property," and, hence, this cause of action cannot be pursued under the statute.

In *Atlantic Coast Line* v. *Riverside Mills*,[7] the court said: "The indisputable affect of the Carmark amendment is to hold the initial carrier engaged in interstate commerce and receiving property for transportation from a point in one State to a point in another State, as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents." The court then went on to set forth[8] the doctrine generally accepted in America,[9] in the absence of legislation, that a carrier unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier; and the English doctrine,[10] followed in some American jurisdictions,[11] that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation and an assumption of full carrier liability by the initial carrier.

The court then said:[12] "In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress by the act[13] here involved has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout."

"This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of car-

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[7] 219 U. S. 186 (1910).

[8] *Supra*, note 7, pages 196, 197.

[9] R. R. v. Manufacturing Co., 16 Wall. 83 U. S. 324 (1872); R. R. v. Pratt, 22 Wall. 89 U. S. 123 (1874); R. R. v. McCarthy, 96 U. S. 258 (1877); Myrick v. M. C. R. R., 107 U. S. 102 (1882); Burroughs v. N. & W. R. R., 100 Mass. 26 (1868).

[10] Muschamp v. Lancaster Ry. Co., 8 M. & W. 421 (Eng. 1841); Bristol, *etc.*, Ry. v. Collins, 7 H. L. Cases, 194 (Eng. 1859).

[11] R. R. v. Mt. Vernon Co., 84 Ala. 175 (1887); R. R. v. Hasselkus, 91 Ga. 384 (1893); Beard v. R. R., 79 Iowa, 531 (1890); R. R. v. Wilcox, 84 Ill. 240 (1876); Kyle v. R. R., 10 Rich. 382 (S. C. 1857); R. R. v. Rogers & Hartsell, 6 Heisk. 143 (Tenn. 1871); R. R. v. Campbell, 7 Heisk. 257 (Tenn. 1872).

[12] *Supra*, note 7, at page 198.

[13] *Supra*, note 1.

riers was the matter which Congress undertook to regulate. Thus when this Carmark Amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said: 'One of the great complaints of the railroads has been—and, I think, a reasonable, just and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit.' " [14]

The court continued:[15] "That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier.

"Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route.

"In substance Congress has said to such carriers, 'If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the

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[14] Cong. Record, Pt. 10, page 9580.

[15] *Supra*, note 7, at page 203, *et seq.*

transit, you must use them as your own agents and not as agents of the shipper.'"

In *Adams Ex. Co.* v. *Croninger*,[16] the Supreme Court, speaking through Mr. Justice Lurton, said: "Prior to that amendment (the Carmark Amendment) the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and State courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States;[17] or that determined by the supposed public policy of a particular State;[18] or that prescribed by statute law of a particular State.[19] . . . That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation, or contract. . . . The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject. . . . The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' *and plainly implies a liability for some default in its common law duty as a common carrier.*"

In the principal case[20] the Maryland court said, "The reason and policy of the act are sufficiently broad to include the liability here sought to be charged. The remedies of the shippers in respect to losses of value from delay of transportation were subject to the same diversities and inconveniences as were those relating to recovery for physical injury to the property accepted for carriage. In each class of cases there was an apparent and equal need of uniformity and simplicity in the regulation and enforcement of the carrier's liability."

From the language and decisions in the Croninger and Riverside Mills Cases we are practically compelled to agree with the Maryland court as to the "reason and policy of the act" as well as to the "equal need of uniformity and simplicity," but it is submitted that "reason and policy" and even "equal need" do not necessarily determine the intent of Congress. But even granting that it was the legislative intent to include, within the scope of the act, conse-

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[16] 226 U. S. 491, 33 Sup. Ct. Rep. 148, 57 L. Ed. 314 (1912).
[17] Hart v. Pennsylvania R. R., 112 U. S. 331 (1884).
[18] Pennsylvania R. R. v. Hughes, 191 U. S. 477 (1903).
[19] Chicago, etc., R. R. v. Sloan, 169 U. S. 133 (1897).
[20] *Supra*, note 2.

quential damages to the owner due to delay, it is submitted that there must be some words in the act which lend themselves to such construction; some words at least approximately appropriate for the expression of such intent; the words used must be sufficiently ambiguous to allow some reasonable difference of opinion as to their interpretation. It is rather difficult to conceive how the words "damage *to property*" can mean damage *to the owner* where the actual property itself has suffered no loss of quantity or quality. Though there be "equal need" of uniformity of regulation, yet if Congress has legislated as to "loss or damage," but failed to legislate as to "delay," the act does not cover both class of cases. If the result reached by the Maryland court is correct, it is at least rather a forced construction of the words of the act. As has been noted, however, the case has been appealed to the Supreme Court of the United States and we can do no more than await the decision of that tribunal, remembering that, as we have seen from the Riverside Mills Case, that the court has already expressed itself rather strongly in favor of the view that the act imposes full carrier liability, throughout the entire route, upon the initial carrier.

In the Croninger Case[21] it was said that: "The constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, *delay*, injury, or damage to such property." It might be argued that the use of the word "delay" in the sentence just quoted indicates that the Supreme Court regarded that cause of loss as a separate and distinct ground of liability, and that, as it is not specifically mentioned in the Carmark Amendment, it should be held to be excluded from the remedy therein provided.

C. McA. S.

LIBEL—EQUITY JURISDICTION—Upon the question of preventive relief in equity by injunction against the publication of libellous statements, affecting the character or business of a person, there seems to be a misunderstanding of the true state of the law on the part of text-book writers and a few State courts. The Circuit Court of Appeals of the Second Circuit, in a recent case,[1] has, in a very lucid opinion, cleared up the mist, and pointed out distinctly the settled rules upon the subject.

In respect to the remedy by injunction, a libel occupies much the same position as a crime. As was said by Lord Eldon:[2] "The

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[21] 226 U. S. 491 (1912), at page 500.

[1] American Malting Co. v. Keitel, 209 Fed. Rep. 351 (1913).

[2] Gee v. Pritchard, 2 Swanst. 413 (Eng. 1818).

publication of a libel is a crime; and the court of chancery has no jurisdiction to interfere by injunction to prevent the commission of crimes." The early English decisions are uniformly to the effect that where the injury complained of is that of defamation of character only, there is no rule of equity conferring jurisdiction to restrain it by injunction.[3] Equity will, however, as a rule, act to protect property rights; and in several applications for injunction to restrain libellous publications, it was urged that they would injure property, *viz.*, the good will and business of the complainant. But the court[4] answered that contention by stating: "With regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations which have an effect upon their character and upon their trade or business; but no case can be produced in which, in these circumstances, the court of chancery has interfered." So that, the almost unbroken line of English decisions affirms the doctrine that the preventive jurisdiction of equity being limited to the protection of property rights which are remediless by the usual course of procedure at law, courts of equity will not restrain the publication of libels though such publications are calculated to injure the credit, business or character of the person aggrieved, and that the complainant will be left to pursue his remedy at law; it being considered that in cases of libel and slander there is a plain, adequate and complete remedy at law.

There are two English decisions[5] in which Vice-Chancellor Malins granted injunctions against libels. But these decisions were flatly in the teeth of the settled rule, and followed the fate of most of that learned Vice-Chancellor's opinions: they were overruled in 1875 by a court consisting of Lord Cairns, Lord Justice James, and Lord Justice Mellish, probably as strong a Court of Appeal in Chancery as ever sat, where it was ruled as well-settled that the court of chancery has no jurisdiction to restrain the publication of a libel.[6] This rule, however, has been changed by statute in England. The Common Law Procedure Act of 1854 conferred on the English courts of common law the power to grant injunctions in all personal actions of contract or tort, with no limitation as to defamation. And by the Judicature Act of 1873, a power was conferred upon the Chancery division of the High Court to grant injunctions in cases of libel. But the English courts still interfere only in the clearest cases.

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[3] Clark v. Freeman, 11 Beav. 112 (Eng. 1848); Mulkern v. Ward, L. R. 13 Eq. 619 (Eng. 1872); Hammersmith Co. v. Dublin Co., L. R. 10 Eq. 235 (Eng. 1870).

[4] Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 142 (Eng. 1875).

[5] Springfield Co. v. Riley, L. R. 6 Eq. 551 (Eng. 1868); Dixon v. Holden, L. R. 13 Eq. 355 (Eng. 1872).

[6] Prudential Assurance Co. v. Knott, L. R. 10 Ch. App. 142 (Eng. 1875).

The undoubted weight of American authority is in accord with the English doctrine prior to the statutes aforementioned.[7] Our courts adopted the rule as one firmly established in equity jurisprudence. And several courts have laid stress on the fact that a contrary holding would abridge freedom of speech and the liberty of the press. There are cases, however, where courts have issued injunctions to restrain the publication of false statements injurious to business or property; but those were cases which involved conspiracy, intimidation or coercion.[8] For example, an injunction was issued to restrain one from issuing circulars threatening to bring suits for infringements against all customers dealing in a competitor's patented article, thus attempting to intimidate complainant's customers by threatening them with suits which the defendants never intended to prosecute.

In view of the extent to which libellous publications are being used today by unscrupulous men to further their private interests by defaming the good name and reputation of their competitors, and in view of the pernicious and detrimental effect of this upon business, the greater protection afforded by the English courts under the present statutes seems to be demanded by a just regard for the vastness and variety of our commercial interests. In practice, the liability to criminal prosecution or to a civil action for damages has not proved effectual. Our jurisprudence must in some way meet that demand. An immediate change by the courts themselves would be a palpable violation of judicial functions. It is, then, for the legislators to realize that our commercial interests require a prevention of the wrong, rather than punishment or satisfaction for it after it is committed.

Y. L. S.

WITNESSES—SELF-INCRIMINATION—IMMUNITY—The Court of Criminal Appeals of Texas recently held[1] that under the codes as construed by the decisions, where the district attorney tenders immu-

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[7] Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Sherry v. Perkins, 147 Mass. 212 (1888); Marlin Co. v. Shields, 17 N. Y. 384 (1902); Balto. Life Ins. Co. v. Geisner, 202 Pa. 386 (1902); Mayer v. Journeyman Assn., 47 N. J. Eq. 519 (1890); Singer Mfg. Co. v. Domestic Co., 49 Ga. 70 (1873); Kidd v. Hoery, 28 Fed. Rep. 774 (1886); Co. v. Union, 51 Fed. Rep. 260 (1891); Edison v. Co., 128 Fed. Rep. 957 (1904); Mtg. Assn. v. Co., 150 Fed. Rep. 413 (1907); Citizens Co. v. Mtg. Co., 171 Fed. Rep. 553 (1909); College v. Co., 197 Fed. Rep. 982 (1912); Francis v. Flynn, 118 U. S. 385 (1885).

[8] Beck v. Ry. Union, 118 Mich. 497 (1898); Einack v. Kane, 34 Fed. Rep. 46 (1888); Casey v. Union, 45 Fed. Rep. 135 (1891); Adriance Co. v. Nat'l Co., 121 Fed. Rep. 827 (1903).

[1] *Ex parte* Muncy, 163 S. W. Rep. 29 (Tex. 1914).

nity from punishment and such offer receives the sanction and approval of the district judge, this furnishes absolute and complete immunity from punishment for offenses about which he might be questioned and called to testify, and the witness cannot claim the privilege from self-incrimination and could be imprisoned for his refusal to testify.

One of the most cherished sanctions of our common law is that a witness will not be compelled to answer any question the reply to which would supply evidence by which he could be convicted of a criminal offense.[2] Such privilege, moreover, has been almost universally secured by constitutional provision. Stringent as the general rule is, certain classes of cases have always been treated as not falling within the reasons of the rule, and, therefore, constituting apparent exceptions. When examined these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else. Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases, and with that criminality the privilege. An acquittal conclusively negatives criminality and in such case the rule does not apply.[3] The same is true of a crime erased by lapse of time. Such is in effect an expurgation of the crime, and after the lapse of the time fixed by the law the privilege ceases.[4]

Statutes of indemnity and special amnesty have the same effect, when they do not conflict with local constitutions.[5] The law, however, must afford absolute immunity against future prosecution for the offense to which the question relates.[6] If the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible,—in other words, if his testimony operates as a complete pardon for the offense to which it relates,—a statute absolutely securing him such immunity would satisfy the constitutional guaranty against being compelled, in any criminal case,

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[2] Whart. Cr. Ev. (8th Ed.), §463; Greenleaf Ev. (15th Ed.), Vol. 1, §451.

[3] Floyd v. State, 7 Tex. 215 (1851).

[4] Malanke v. Cleland, 76 Ia. 401 (1888); Lamson v. Boyden, 160 Ill. 613 (1896).

[5] Whart. Cr. Ev. (8th Ed.), §471.

[6] Counselman v. Hitchcock, 142 U. S. 547 (1892); Cullen v. Comm., 24 Grat. 624 (Va. 1873),—"that nothing short of complete amnesty to the witness, and absolute wiping out of the offense as to him, so that he could no longer be prosecuted for it, would furnish indemnity."—Quoted with approval in *Ex parte* Carter, 166 Mo. 604 (1902).

to be a witness against himself.[7] It may be said that statutory immunity virtually repeals the law creating the crime under the particular state of facts, or to put it in technical form, the law defining the offense is restricted in its application so as to prevent there being an offense under a given state of facts in which the immunity is declared to exist. Criminality is the creation of the law, not an inherent element in the act itself. It may therefore be taken away by the law. Many such statutes annulling the privilege against self-incrimination have been passed.[8] They have been the expedients resorted to for the investigation of offenses whose proof and punishment were otherwise practically impossible because of the criminal implication to the offense itself of all who could bear useful testimony. Any evidence that a witness may give under a statutory direction will not be "against himself" for the reason that by the very act of giving evidence he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given.[9]

The majority of the court in the present case maintain that the constitutional inhibition has no application any more than in the above cases for the witness is protected against the evidence he may give being used against him, and this is what the constitution guarantees him—nothing more and nothing less. But is this true, is he protected? Davidson, J., in a vigorous dissent, says that after a most painstaking investigation he had found that the power to thrust immunity upon a witness against his consent, and compel his testimony where such testimony implicates him in a crime, had never been lodged or vested in the judicial department of the government. As brought out by counsel in their argument and the dissenting opinion the cases cited by the majority as supporting the view that the courts have this right will be found to be cases where the witness agreed to testify. Indeed it may be said that no case holding assent not necessary can be found. The majority say that it would be absurd to require the district judge and attorney when they desire to use a witness to beg him to enter into agreement with the State, that it would be lowering the dignity of the courts to require such a thing. Such can hardly be said to be the case where a constitutional privilege is at stake. Such immunity as tendered here does not seem to be complete because the whole matter was conditional upon his testifying and carrying out the agreement. This is what differentiates it from the statutory immunity, which is complete whenever he is used as a witness and compelled to testify. Moreover the immunity granted to obtain the testimony is in the nature of a pardon or amnesty, and no pardon or amnesty

[7] Brown v. Walker, 161 U. S. 591 (1896), Brown, J.
[8] Wigmore, Ev. (1905), Vol. IV, p. 3167.
[9] *Ex parte* Cohen, 104 Cal. 524 (1894).

can be effective until voluntarily accepted by the person pardoned.[10] This is another reason in support of the proposition that the court cannot, at request of state's attorney or otherwise, compel the accused to testify against his will.

It has been said that the constitutional guaranty protects a witness from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution.[11] This doctrine rests on a misconception so radical,[12] that it has been repeatedly repudiated by the courts. The law still remains unsettled on this question but the great weight of authority[13] is that he may be compelled to answer, if the answer can have no effect upon the case, except so far as to impair the credibility of the witness, he may fall back upon his privilege. But even in the latter case, if the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer.[14] In questions involving a criminal offense, the rule, as we have seen, is different, the witness being permitted to judge for the most part for himself, and to refuse to answer wherever it would tend to subject him to a criminal punishment.[15]

The privilege is a personal one, which the witness may waive.[16] He is said to waive it when he testifies without objection.[17] By testifying as to part, he waives the protection and can be compelled to testify as to the whole.[18] In order to be available, it must be claimed by the witness,[19] and if he does not, no one else can claim it for him, nor can he use it for the protection of another.[20] The proper time to raise the objection is upon the asking of the question which the witness fears he may incriminate himself by answering, at whatever stage of the proceeding such question is asked.[21] He cannot avail himself of the privilege by stating he throws himself

[10] Comm. v. Halloway, 44 Pa. 210 (1863); Rosson v. State, 23 Tex. App. 287 (1887); U. S. v. Wilson, 7 Pet. 150 (U. S. 1833).

[11] Field, J., dissenting, Brown v. Walker, *supra*, note 7.

[12] Wigmore Ev. (1905), Vol. IV, p. 3108.

[13] 1 Greenl. Ev. (15th Ed.), §§454, 455; People v. Mather, 4 Wend. 229 (N. Y. 1830); Weldon v. Burch, 12 Ill. 374 (1851); *Ex parte* Rowe, 7 Cal. 184 (1857).

[14] 1 Greenl. Ev. (15th Ed.), §456.

[15] French v. Venneman, 14 Ind. 282 (1860); Simons v. Holster, 13 Minn. 249 (1868).

[16] East India Co. v. Atkins, 1 Stra. 168 (Eng. 1719); Fries v. Brugles, 12 N. J. L. 79 (1830); Comm. v. Nicholls, 114 Mass. 285 (1873).

[17] People v. Willard, 150 Cal. 543 (1907).

[18] People v. Freshour, 55 Cal. 375 (1880); Comm. v. Pratt, 126 Mass. 462 (1879).

[19] State v. Ekanger, 8 N. D. 559 (1899).

[20] *In re* Moser, 138 Mich. 302 (1904).

[21] Amherst v. Hollis, 9 N. H. 107 (1837); Pitcher v. People, 16 Mich. 142 (1867); Eckstein's Petition, 148 Pa. 509 (1892).

on his privilege, but he must make oath that in his opinion the effect of his answer would tend to incriminate him.[22] The witness, himself, is not the sole judge of whether an answer to a question will tend to incriminate him so as to entitle him to refuse to answer;[23] but it is for the court before which the question is raised to decide whether a witness must answer.[24] And, in order to entitle the witness to the privilege of silence, the court must see from the circumstances of the case and the nature of the evidence called for that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.[25]

S. L. M.

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[22] Penna. Bldg., *etc.*, Assoc. v. Mayer, 2 Mont. Co. Rep. 41 (Pa. 1886); People v. Seaman, 8 Misc. Rep. 152 (N. Y. 1894).

[23] State v. Duffy, 15 Ia. 425 (1863).

[24] Comm. v. Bell, 145 Pa. 374 (1891); U. S. v. Burr, Fed. Cas. No. 14,692e (1807).

[25] Manning v. Mercantile Securities Co., 242 Ill. 584 (1909); State v. Murray, 82 Ohio, 305 (1910).